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NTSB Order No. EA-4190

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 7th day of June, 1994

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DAVID R. HINSON,  
Administrator,  
Federal Aviation Administration,

Complainant,

v.

Dockets SE-13596 and  
SE-13597

JAMES RONALD WIELAND and  
CAROLE ANN PERRY,

Respondents.

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OPINION AND ORDER

Respondents have appealed from the oral initial decision issued by Chief Administrative Law Judge William E. Fowler, Jr., at the conclusion of a two-day evidentiary hearing held in these consolidated emergency proceedings on April 26 and 28, 1994.<sup>1</sup> In that decision, the law judge affirmed emergency orders revoking

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<sup>1</sup>Attached is an excerpt from the hearing transcript containing the oral initial decision.

both respondents airline transport pilot (ATP) certificates based on their alleged violations of 14 C.F.R. 91.13(a) and 121.535(f) [careless or reckless operation]; 91.167(a) and 121.639 [operation without sufficient fuel to fly to intended destination then to alternate airport and 45 minutes thereafter]; and 121.315(c) [failure to follow approved cockpit check procedures, specifically, failure to insure appropriate fuel on board] . In addition, respondent Wieland was charged with violating 91.103 [failure of pilot-in-command to become familiar with fuel requirements for the flight]; 91.183(c) [failure of pilot-in-command to report by radio information relating to the safety of flight]; and 121.557(c) [failure of pilot-in-command exercising emergency authority to keep air traffic control (ATC) fully informed of the progress of the flight].<sup>2</sup>

For the reasons discussed below, we grant respondents' appeals. The initial decision is reversed insofar as it affirms violations of sections 91.183(c) and 121.557(c) against respondent Wieland, and on the issue of sanction. We affirm the remainder of the violations charged against respondents but, in light of respondents' timely filing of reports under the Aviation Safety Reporting Program (ASRP), hold that they are entitled to immunity from sanction under that program.

The facts in this case are largely undisputed. On February 22, 1994, respondent Wieland served as pilot-in-command and respondent Perry as first officer of USAir flight 565, a

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<sup>2</sup> These regulations are reproduced in the appendix.

passenger-carrying flight which departed from Washington National Airport, Washington, D.C. (National), with -an intended destination of Logan International Airport in Boston, Massachusetts. The aircraft was scheduled to be refueled before departing from National but, for reasons not fully explained in the record, it was not.<sup>3</sup> Accordingly, although the flight plan indicated that the flight should have had 14,500 pounds of fuel on board, it left the gate with only 6,400 pounds. This was insufficient fuel to meet the requirements of sections 91.167(a) and 121.639, and respondents admit as much.<sup>4</sup> Respondents also concede that they overlooked the first item on the before-start checklist ("fuel") , and thus implicitly admit that they failed to follow approved cockpit check procedures, in violation of section 121.315(c).

Some 25 minutes after departure from National, upon reaching their cruising altitude at 33,000 feet, captain Wieland noticed the low fuel gauge readings and immediately questioned first officer Perry and performed a test of the fuel gauges in an attempt to verify that they had obtained fuel at National as planned. However, it quickly became clear to both respondents

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<sup>3</sup> The record indicates that the aircraft, operated by the same flight crew, arrived at National later than scheduled due to delays on the previous leg of the flight, and was on the ground for only a short time before departing for Boston.

<sup>4</sup> Even though, as respondents point out, this might have been sufficient fuel to reach Boston, the cited regulations require enough fuel to fly to the airport of intended landing, *and to an alternate airport and for an additional 45 minutes* thereafter. Respondents do not claim that they took off with enough fuel to accomplish all of this.

that the flight had not in fact been refueled as expected. Respondent Wieland thereupon instructed respondent Perry -- who, as the non-flying pilot on that leg, was responsible for communicating with ATC -- to declare an emergency and inform the controller then handling their flight that they would have to land at LaGuardia Airport in New York.<sup>5</sup> That controller, and the controllers who subsequently handled respondents' flight during their descent and landing, responded to the declared emergency by expediting the flight's descent and giving it priority handling.

When ATC first inquired as to the nature of respondents' emergency, respondent Wieland instructed respondent Perry 'to state that they were losing oil pressure in one of their engines. When asked to repeat the nature of the emergency a short time later, respondent Wieland told Perry to state that they had lost power in their right engine. In response to the controllers' subsequent requests for the amount of fuel remaining on board (a standard inquiry whenever an emergency is declared) , respondent Wieland told respondent Perry to say they had 6,000 pounds. Respondent Wieland could give no clear explanation for why he told first officer Perry to misrepresent the nature of the

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<sup>5</sup> Respondent Wieland explained that he chose LaGuardia because he already had the airport in sight and, due to having made regular flights into that airport, was most familiar with landing procedures there. The Administrator argues that he should have landed at Kennedy Airport, as it was not in a heavily congested location like LaGuardia. However, we cannot find fault with respondent's stated reason for landing at LaGuardia and, in view of the Administrator's failure to prove that safety was compromised by that choice, we decline to second-guess it.

emergency, except to say that he was "stunned" at the discovery that they had not been refueled, and he simply had his first officer tell ATC whatever he thought would assure the flight of the most expeditious handling possible. He also stated that the ATC requests for information were "becoming distractive" and indicated a concern that, if he told ATC that low fuel was the cause of his emergency, requests for the number of minutes remaining in fuel might have become more frequent. The flight landed at LaGuardia some 15 minutes after the emergency was declared, with 1,200-2,000 pounds of fuel on board.<sup>6</sup>

In retrospect, respondent Wieland admitted that he made a mistake in not disclosing the true basis for his declaration of an emergency, but emphasized that at the time he was completely focused on getting the aircraft on the ground as quickly as possible.

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<sup>6</sup> The Administrator introduced testimony from several USAir mechanics who inspected the aircraft upon its arrival, and who indicated that the fuel gauges showed approximately 1,200-1,250 pounds of fuel before additional fuel was expended in testing the engine. On the other hand, respondents introduced testimony tending to show that, based on the amount of fuel added the next day to achieve a fuel load of 17,000 pounds, the aircraft must have had at least 2,000 pounds prior to that refueling. We think the law judge's finding that the aircraft landed with only 1,250 pounds of fuel represents a credibility finding in favor of the mechanics eyewitness testimony as to the fuel gauge readings. We will not disturb that finding. Nonetheless, we recognize that, if the fuel indicators were inaccurate (a condition apparently not uncommon in the DC-9 at lower fuel levels), the respondents' explanation of the fuel on board might also be correct.

In any event, the difference is not relevant to the regulations at issue in this case.

Although the complaints contain no allegations pertaining to events which occurred after the aircraft landed, we note that respondent Wieland initially indicated to USAir personnel on the ground that oil pressure/engine trouble was the cause of the emergency landing and that he made an entry in the aircraft logbook stating the same. However, the actual cause of the emergency landing soon became apparent to the mechanics, and respondent Wieland corrected the logbook entry within half an hour to reflect that the landing was due to low fuel.

Both respondents accepted 60-day suspensions imposed by their employer, and have indicated a willingness throughout this proceeding to accept responsibility for their failure to insure that the appropriate amount of fuel was on board the flight. They have maintained, however, that their misstatements to ATC regarding the basis for the emergency had no impact on the manner in which it was handled, or on the safety of the flight, and should not play a part in determining the sanction in this case. The Administrator's investigating inspector conceded at the hearing that the recommended sanction for a case involving fuel mismanagement or exhaustion would be a 30 to 150-day suspension. Thus, the primary issue in this appeal is whether revocation is warranted for respondents' violations in this case. We agree with respondents that it is not.<sup>7</sup>

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<sup>7</sup> We note that the law judge -- although he felt bound by our decision in Administrator v-. Muzquiz, 2 NTSB 1474 (1975) to affirm the revocations because, in his view, the Administrator had proven all of the allegations in the complaint -- expressed  
(continued. ..)

Although we do not condone respondents' misstatements to ATC, we are unable to conclude that those statements violated any of the regulations cited by the Administrator in this case.<sup>8</sup> Specifically, we find no violation of sections 91.13(a) or 121.535(f), which prohibit careless or reckless operation so as to endanger people or property. In spite of the Administrator's claim that "the potential for disaster was drastically increased" because of respondents' misrepresentation of the nature of their emergency (Reply Br. at 20-21) , the record does not support this assertion. Indeed, the controller who was handling respondents' aircraft when they first declared the emergency made clear that he would have handled the flight the same way regardless of whether the grounds for the emergency had been stated as low fuel or engine failure.

The flight was cleared by a series of controllers to descend rapidly, and it landed at LaGuardia without significant delay within 15 minutes of having declared an emergency. The Administrator presented testimony indicating that, if requested by the pilot, the descent to LaGuardia could have been expedited even more, and the aircraft could have been given "full priority" to land ahead of other aircraft that might be in front of it. It was conceded, however, that such priority did not appear to be

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<sup>7</sup> . (...continued)  
his personal feeling that the sanction in this case should be something less than revocation.

<sup>8</sup> This is not to say that respondents' untruthfulness might not implicate other regulatory provisions not cited here.

necessary in this case as there was sufficient spacing between respondents' flight and the only aircraft which landed ahead of them. In sum, because the Administrator failed to prove that ATC's handling of this flight would have been significantly different if it had known that the cause of the emergency was low fuel rather than engine failure, he failed to prove that any potential endangerment associated with this incident was attributable to or augmented by those misstatements.<sup>9</sup>

Nor can we agree with the Administrator's position that the mischaracterizations of the nature of the emergency ran afoul of sections 91.183(c) (requiring the pilot-in-command of an IFR flight to report by radio "[a]ny other information relating to the safety of flight"), or 121.557(c) (requiring a pilot-in-command exercising emergency authority to keep ATC "fully informed of the progress of the flight").

Respondents' expert noted that section 91.183(c) does not require reporting of information affecting the safety of the reporting pilot's flight, but rather refers only to the safety of

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<sup>9</sup> Thus, this case differs from Administrator v. Eden, NTSB order No. EA-3932 (1993), where we reinstated revocation based on respondent's deviation from ATC clearances and instructions, when those deviations were associated with his misrepresentations to ATC that he had a minimum fuel situation in order to obtain priority treatment and direct routings he had previously been denied. In that case, we held that respondent had abused the 'ATC system, and that his false statements had created difficulties for the controllers and interfered with their normal operations. No such abuse exists in this case, as there is no claim that respondents did not legitimately declare an emergency. Thus, respondents were entitled to the priority treatment they received. Their incorrect description of the nature of the emergency created no additional difficulties or interference with ATC functioning.

flight in general. His understanding was that the regulation requires reporting of such things as hazardous meteorological conditions, inoperative airport navigational aids, volcanic ash, or flights of migratory birds. (Tr. 436-37.) This interpretation is consistent with subsection (b) of that section, which requires reporting of unforecast weather conditions, and also comports with the plain language of the rule. Aside from the investigating inspector's conclusory opinion that this regulation required respondents to accurately describe the nature of their emergency, the Administrator offered no evidence in support of his interpretation.

Regarding section 121.557(c), we think respondent Wieland adequately complied with the **requirement to keep** ATC informed as to "the progress of the flight." As noted by respondents\* expert, the flight maintained continuous communication with the appropriate ATC facility, and ATC was at all times fully aware of the location of the aircraft (i.e., its progress) and its need to land quickly. (Tr. 437-38.) The Administrator is bound by the language of his own regulation, and that language cannot support the Administrator's interpretation in this case.

In sum, the Administrator's interpretations of sections 91.183(c) and 121.557(c) are unsupported by any evidence of their reasonableness (such as prior statements or interpretations) , and are patently inconsistent with the plain language of these sections. Accordingly, we need not defer to those interpretations. Administrator v. Miller, NTSB Order No. EA-3581

(1992) . The alleged violations of sections 91.183(c) and 121.557(c) are dismissed.

We will, however, affirm the violations of sections 91.13(a), 121.535(f), 91.167(a), and 121.639, and (against respondent Wieland only) section 91.103. These violations all pertain to respondents' admitted failure to ascertain and verify the fuel on board the aircraft before departure, a lapse for which respondents appear to agree they are jointly responsible.<sup>10</sup> We disagree with the Administrator, however, that respondents were also culpable in not discovering the low fuel situation sooner than they did, thus permitting them to divert to a closer airport or to immediately return to National. There is no evidence that respondents had a duty to continuously monitor the fuel gauges during their departure and ascent out of National Airport. The record establishes that respondents were faced with numerous other safety responsibilities during this portion of their flight. In light of these demands, and respondents' sincere (albeit erroneous) belief that the aircraft had been

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<sup>10</sup> We note respondents' position that USAir's gradual elimination of several additional procedures related to checking fuel on board was a contributing factor in this case. Indeed, the record indicates that incidents of USAir **crews leaving the gate without the proper fuel load increased significantly after the removal of those checks**, and that some of the checks were reinstituted after the subject incident. However, we agree with the Administrator that these circumstances, including the FAA's alleged failure to prevent USAir **from removing the other checks**, do not excuse respondents' violations here. Moreover, it appears that the FAA did object to USAir's **removal of the checks**, and asked USAir to correct the situation. (See attachments to respondents' motion to dismiss.) Thus, it appears that respondents' complaint in this regard is more properly directed against their employer than the FAA.

properly fueled at National, we cannot fault respondents for not scanning the fuel gauges and discovering their low fuel situation until 25 minutes into their flight, the point at which they reached their cruising altitude and their workload decreased.

Finally, we address the issue of sanction. As noted above, the Administrator's investigating inspector conceded at the hearing that agency policy dictates a 30 to 150-day suspension in cases of fuel mismanagement or exhaustion. (Tr. 275-76.) Indeed, we are unaware of any Board precedent affirming higher sanctions for violations similar to those involved in this case. However, we need not determine the exact length of the suspensions which would be warranted by respondents' violations, because their filing of reports under the ASRP renders the issue moot.<sup>11</sup>

Under the terms of the ASRP, respondents are entitled to immunity from sanction so long as 1) the violations were inadvertent and not deliberate; 2) they did not evidence a lack of qualification; 3) respondents have not been found guilty of other violations within the past five years; and 4) they submit proof that an ASRP report was filed within 10 days of the incident. See Ferguson v. NTSB, 678 F.2d 821, 826 (9th Cir. 1982), citing FAA Advisory Circular 00-46. In our judgment, all four criteria have been met. Other than asserting that respondents have demonstrated a lack of qualifications, a claim

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<sup>11</sup> See Administrator v. Friday, 6 NTSB 949 (1989) (Board will not review the length of suspension when ASRP immunity is granted).

which we reject on this record, the Administrator has offered no reason why respondents should not be granted immunity pursuant to the ASRP.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' appeals are granted;
2. The initial decision is modified as discussed herein; and
3. The emergency revocations of respondents pilot certificates are hereby modified to suspensions with waivers of penalty.

VOGT, **Chairman**, HALL, Vice Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order. Vice Chairman HALL **submitted the following concurring statement.**

§ 91.13 Careless or reckless operation.

(a) *Aircraft operation the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

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§ 121.535 Responsibility for operational control: Flag air carriers.

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(f) No pilot may operate an aircraft in a careless or reckless manner so as to endanger life or property.

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§ 91.167 Fuel requirements for flight in IFR conditions.

(a) Except as provided in paragraph (b) of this section, no person may operate a civil aircraft in IFR conditions unless it carries enough fuel (considering weather reports and forecasts and weather conditions) to—

(1) Complete the flight to the first airport of intended landing;

(2) Fly from that airport to the alternate airport; and

(3) Fly after that for 45 minutes at normal cruising speed or, for helicopters, fly after that for 30 minutes at normal cruising speed.

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§ 121.639 Fuel supply: All operations: domestic air carriers.

No person may dispatch or take off an airplane unless it has enough fuel—

(a) To fly to the airport to which it is dispatched;

(b) Thereafter, to fly to and land at the most distant alternate airport (where required) for the airport to which dispatched; and

(c) Thereafter, to fly for 45 minutes at normal cruising fuel consumption.

§ 121.315 Cockpit check procedure.

(a) Each certificate holder shall provide an approved cockpit check procedure for each type of aircraft.

(b) The approved procedures must include each item necessary for flight crewmembers to check for safety before starting engines, taking off, or landing, and in engine and systems emergencies. The procedures must be designed so that a flight crewmember will not need to rely upon his memory for items to be checked.

(c) The approved procedures must be readily usable in the cockpit of each aircraft and the flight crew shall follow them when operating the aircraft.

§ 91.103 Preflight action

Each pilot in command shall, before beginning a flight, become familiar with all available information concerning that flight. This information must include—

(a) For a flight under IFR or a flight not in the vicinity of an airport, weather reports and forecasts, fuel requirements, alternatives available if the planned flight cannot be completed, and any known traffic delays of which the pilot in command has been advised by ATC;

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§ 91.183 IFR radio communications.

The pilot in command of each aircraft operated under IFR in controlled airspace shall have a continuous watch maintained on the appropriate frequency and shall report by radio as soon as possible

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(c) Any other information relating to the safety of flight.

6121.557 Emergencies: Domestic and flag air carriers.

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(c) Whenever a pilot in command or dispatcher exercises emergency authority, he shall keep the appropriate ATC facility and dispatch centers fully informed of the progress of the flight. The person declaring the emergency shall send a written report of any deviation through the air carrier's operations manager, to the Administrator. A dispatcher shall send his report within 10 days after the date of the emergency, and a pilot in command shall send his report within 10 days after returning to his home base.

Concurring statement of Vice Chairman Jim Hall:

I concur in the Board's decision, without hesitation but with a sense of some disappointment. This proceeding involves not only careless fuel mismanagement, for which respondents have been held accountable, though without sanction -- this proceeding also involves the more problematical fact that respondents sought, for whatever reasons, to disguise the nature of their problem, first to ATC and then to their employer and FAA. Respondents have offered reasons for their dissembling, but these are not so convincing to me that they would have protected respondents against charges of falsification or want of good-moral character. Nevertheless, these proceedings are proceedings at law, and must be decided with due regard for the requirements of fair legal process. Because respondents cannot in this proceeding be held accountable for violations with which they were not charged, I join in the remainder of the Board in its decision.